92-262

No._____

Supreme Court, U.S.
FILED
AUG 6 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NEWTON LUCKETT and
JOHN ROUTION - - - - - - - Petitioners

versus

DORMAS RUSSELL - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff's unsupported assertion of prejudice, where such assertion is obviated by announcing ready for trial on the merits, is sufficient to meet the first prong of the three-part test controlling a Fed.R.Civ.P. 55(c) motion to set aside a default, especially where the Court of Appeals' finding on that prong was determinative of the outcome in reversing the District Court's own action in setting aside the default, and where the Court of Appeals remanded for a trial on damages after the issue of liability was resolved by a directed verdict against plaintiff?

2. Whether the Court of Appeals usurped the District Court's discretion when it reversed the District Court's order setting aside an entry of default, and directed that default be re-entered, particularly when the issue of liability was resolved by a directed verdict after respondent announced ready for trial, did not ask for a continuance, and never exercised due diligence to locate or subpoena alleged witnesses?

SUP. CT. R. 14.1(b) LIST OF PARTIES

Al C. Parke, Warden, Kentucky State Reformatory and George Wilson, Secretary of the Corrections Cabinet of the Commonwealth of Kentucky were named as defendants in the District Court, in addition to Petitioners. On March 15, 1989, the District Court granted Parke's and Wilson's motion to dismiss and entered an order dismissing respondent's complaint against Parke and Wilson with prejudice.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NEWTON LUCKETT and
JOHN ROUTION, - - - - - - - - - *Petitioners,*

v.

Dormas Russell, - - - - - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Newton Luckett and John Roution, respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit, entered on March 18, 1992. The court entered an order denying a timely petition for rehearing in banc on May 8, 1992. The court referred the petition for rehearing to the original hearing panel which denied the petition for rehearing in the same order.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit which reversed the District Court's order vacating the entry of default in favor of respondent was not recommended by the Court of Appeals for full-text publication. It is reprinted in the appendix hereto, pp.1a-10a, *infra*.

JURISDICTION

An order of the United States Court of Appeals for the Sixth Circuit was entered on March 18, 1992, reversing the District Court's order vacating the entry of default in favor of respondent. See pp. 1a-10a, *infra*. The Court of Appeals entered an order denying petitioners' timely petition for rehearing in banc on May 8, 1992. After referring the petition for rehearing to the original hearing panel, the panel denied the petition for rehearing in the same order. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 42 U.S.C. §1983, pursuant to which respondent sought damages and the redress of the alleged deprivation and violation under color of state law of rights, privileges, and immunities secured by the 5th, 8th and 14th Amendments of the United States Constitution, and under 28 U.S.C. §§1331 (general federal question jurisdiction), 1343(3)(4) (42 U.S.C. §1983 jurisdictional statutes), 2201, 2202 (declaratory judgment actions).

Respondent, Dormas Russell, was an inmate at the Marion County Jail. Petitioner Luckett was the Marion County (Kentucky) Jailer. Petitioner Roution was a deputy jailer. At the time of the incident which gave rise to this

litigation, Russell was serving a sentence at Marion County Jail for robbery and attempted escape. The incident complained of began when another inmate attempted to take a candy bar away from Russell's friend. Russell stepped between them, and a verbal confrontation began. Russell then returned to his bunk to play cards, when another inmate suddenly struck Russell with a broom handle. Russell's injury consisted of some broken false teeth and a broken partial plate. Jail personnel thereafter took Russell to see a dentist on three occasions, but did not provide cosmetic restoration.

Russell filed a complaint against Luckett and Roution pursuant to 42 U.S.C. §1983 on November 18, 1988, for injuries he sustained while incarcerated in the Marion County Jail. Petitioners were served on November 29, 1988. In the complaint, Russell alleged that Luckett and Roution housed him in a cell with individuals that defendants allegedly knew were prone to violence. Russell also alleged that Luckett and Roution were responsible for a broom being left in his cell which was then used by a fellow inmate to assault him.

After being served, Luckett and Roution contacted the Marion County Attorney, Charles T. Mattingly (now deceased), who repeatedly assured Luckett that he would take care of the case. See pp. 15a-19a, *infra*. According to the affidavit of Salem George, M.D., Mr. Mattingly was suffering from a severe case of cancer for quite some time prior to his death on September 4, 1990. See pp. 20a-21a, *infra*. It was during this period of time that petitioners had expected Mr. Mattingly to have filed their answer to respondent's complaint. Luckett also contacted a local insurance agent who Luckett thought may have written coverage for the claim. See pp. 15a-17a, *infra*. Luckett also

contacted officials with the Kentucky Corrections Cabinet and the President of the Kentucky Jailer's Association, with respect to the difficulty he was having in obtaining a defense. See pp. 15a-17a, *infra*.

Despite petitioners' efforts to see that an answer would be filed, on December 13, 1989, the District Court entered a default[1] on the issue of liability. Finally, after learning of the entry of default, Luckett contacted W. Kenneth Nevitt, counsel for the Kentucky Association of Counties self-insurance trust, which had written the county's insurance coverage at the time suit was filed, but which did not cover acts (such as this one) prior to the effective date of coverage. See, pp. 15a-17a, *infra*. Nevitt appeared on behalf of Luckett and Roution and moved the District Court to set aside its entry of default on January 17, 1990. Nevitt asked the court to allow the parties an additional twenty days to file an answer to the complaint.

The District Court deferred ruling, and directed petitioners to submit an affidavit from the Marion County At-

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[1]The record reflects that the district court entered a default and default judgment on December 13, 1989. It is well settled, however, as the District of Columbia Circuit explained, that "[o]nce a defendant fails to file a responsive answer, he is in *default*, and entry of *default* may be made by either the clerk or judge. A *default judgment* can be entered by a clerk only if a claim is liquidated or, if a claim is unliquidated, by the judge after a hearing on damages. A *default* can be set aside under rule 55(c) for 'good cause shown,' but a default that has become final as a *judgment* can be set aside only under the stricter rule 60(b) standards for setting aside final, appealable orders." *Jackson* v. *Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980) (footnote omitted) (emphasis in original). In its opinion, the Sixth Circuit failed to note this distinction and considered the issue only under the Fed.R.Civ.P. 55(c) standard regarding entry of default. Petitioners agree that Fed.R.Civ.P. 55(c) provides the proper standard.

torney, Mr. Mattingly, regarding his failure to answer. After three months passed without a response from Mr. Mattingly to the court's request, the court denied the motion to vacate the entry of default. On September 21, 1990, Joseph H. Mattingly, III, filed a motion on behalf of petitioners to continue the hearing on damages, which had been set by the court for September 28, 1990, explaining that Charles Mattingly, the former Marion County Attorney, had died on September 4, 1990. On October 15, 1990, Joseph H. Mattingly, III, filed a motion and memorandum on behalf of petitioners, attaching his own affidavit and the affidavits of petitioners and Salem M. George, M.D., in support of their motion, asking the court to reconsider its order denying petitioners' motion to vacate the entry of default. On November 8, 1990, the District Court vacated the entry of default and allowed petitioners to file an answer. See pp. 12a-13a, *infra*.

On February 1, 1991, this case proceeded to trial by jury. On application by respondent, the District Court had ordered that two witnesses, Ronnie Hazelwood, and Randy Brady, who had been incarcerated in the Marion County Jail at the time of the incident, but who were in other facilities at the time of trial, be transported to Louisville to testify on behalf of respondent. Respondent made no other request as to any other alleged witness. At the commencement of the trial, respondent's counsel announced ready for trial. The testimony of one witness, Randy Brady, was heard by the court outside the presence of the jury, and was never heard by the jury because the court found that Brady's testimony was inadmissable. Respondent never appealed that ruling. At the conclusion of respondent's case, the judge directed a verdict in favor of petitioners, and dismissed the case with prejudice.

Respondent appealed the orders setting aside the entry of default and directing a verdict for petitioners. On March 18, 1992, the United States Court of Appeals for the Sixth Circuit reversed the decision of the District Court setting aside the entry of default, and remanded the case for a trial on damages only. See pp. 1a-10a, *infra*. On April 1, 1992, petitioners filed a petition for rehearing in banc. On May 8, 1992, the Sixth Circuit denied the petition.

The Court of Appeals referred the petition for rehearing to the original hearing panel which denied the petition for rehearing in the same order. See p. 11a, *infra*.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Has Effectively Converted the Criteria Controlling A Fed. R.Civ.P. 55(c) Motion To Vacate A Default From A Three-Pronged Test to A Two-Pronged Test In Violation Of Its Own Standards And The Standards Of Other Courts Of Appeals.

In violation of its own standards, and the standards of the Third, Ninth, Second and District of Columbia Circuits, the Sixth Circuit has converted the criteria controlling a Fed.R.Civ.P. 55(c) motion to vacate a default from a three-pronged test to a two-pronged test. Fed.R.Civ.P. 55(c) provides, "[f]or good cause shown, the court may set aside an entry of default . . . ." The three factors which determine the outcome of a motion to vacate a default are: " '[1] [w]hether the plaintiff will be prejudiced; [2] [w]hether the defendant has a meritorious defense; and [3] [w]hether culpable conduct of the defendant led to the default.' " *Invst. Fin. Group, Inc.* v. *Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 398 (6th Cir. 1987), *cert. denied*, 484 U.S. 927 (1987) (quoting *United Coin Meter Co.* v. *Seaboard Coastal Line R.R.*, 705 F.2d 839,845 (6th Cir. 1983)). *See also, Hritz* v. *Woma*

Corp., 732 F.2d 1178, 1181 (3d Cir. 1984); *Falk* v. *Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam); *Meehan* v. *Snow*, 652 F.2d 274, 277 (2d Cir. 1981) (per curiam); *Keegel* v. *Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 373 (D.C. Cir. 1980). In reversing the District Court's decision to set aside its entry of default, the Court of Appeals found that "[b]alancing the factors [which determine the outcome of a motion to vacate a default] is simpler than it might first appear. Only *one* of the three factors weighs in favor of Luckett and Roution." See p. 9a, *infra* (emphasis added). "The same considerations exist when deciding whether to set aside either an entry of default [Fed.R.Civ.P. 55(c)] or a default judgment [Fed.R.Civ.P. 60(b)], but they are applied more liberally when reviewing an entry of default." *Berthelsen* v. *Kane*, 907 F.2d 617, 620 (6th Cir. 1990) (per curiam). " 'Any doubt should be resolved in favor of the petition to set aside the [default] so that cases may be decided on their merits.' " *United Coin*, 705 F. 2d at 846 (quoting *Tozer* v. *Kraus Milling Co.*, 189 F.2d 242, 245 (3rd Cir. 1951)).

In applying the three factors which determine the outcome of a motion to vacate a default, the Court of Appeals incorrectly found that respondent met the first prong of the test. The first prong of the test asks whether plaintiff would be prejudiced by the order setting aside default. Mere delay does not establish prejudice. *Invest*, 815 F.2d at 398. Plaintiff must demonstrate a negative effect from the delay, such as loss of evidence or difficulties in discovery. *Id.* The panel rested its opinion that respondent made an adequate showing of prejudice, and thus met the first prong of the test, by relying *only* on respondent's motion to reconsider the order setting aside the default, wherein respondent's counsel made unsworn assertions that witnesses had moved to other jurisdictions unknown to re-

spondent, and that "[it would] be difficult, if not impossible to locate those witnesses. . . ." See p. 6a, *infra* (quoting plaintiff's motion to reconsider the District Court's order vacating default judgment against defendants). The unsworn statements of prejudice were mere assertions of counsel. These assertions were not supported by any evidence such as affidavits from respondent or his counsel. There was no showing of due diligence by respondent or his counsel to locate these alleged witnesses. "[T]he court 'should . . . construe [ ] all ambiguous or disputed facts in the light most favorable to the defendant[ ],' any doubt should be resolved in favor of the defendant." *Invest*, 815 F.2d at 398 (quoting *Jackson* v. *Beech*, 636 F.2d 831, 838 (D.C. Cir. 1980)). Moreover, "[p]laintiff has failed to establish that any prejudice from the delay would occur, because plaintiff has not shown that discovery would be more difficult or that evidence would be lost." *Invest*, 815 F.2d at 398. Importantly, respondent announced "ready" for trial at the commencement of trial on February 1, 1991, some two months after respondent filed his motion for reconsideration of the court's order which vacated the default.

Here, the trial on the merits proved the unsubstantiated assertions of counsel to be untrue. On application by respondent, the District Court had ordered that Ronnie Hazelwood and Randy Brady be transported from the North Point Training Center in Burgin, Kentucky, and the Hardin County Jail in Elizabethtown, Kentucky, respectively, to the United States District Courthouse in Louisville to testify on behalf of respondent. The fact that respondent was able to present two witnesses who, at the time of trial, were incarcerated in different facilities from the one in which the alleged incident herein occurred, is evidence in total contradiction of respondent's unsupported assertion.

Further, the fact that respondent's counsel announced that he was ready for trial, did not seek a continuance, and did, in fact, call witnesses on respondent's behalf discredits respondent's assertions of prejudice. It is clear that respondent's allegations of prejudice are based on conjecture and are not entitled to the legal significance attached to them by the Sixth Circuit. The Sixth Circuit clearly erred when they stated, "Russell's injury occurred while he was in custody at Marion County Jail, so the key witnesses were also in custody at that time. Two years later, however, the witnesses were all either in other prisons or no where to be found." See p. 6a, *infra*. Despite respondent's success in locating, having transported, and calling two prisoners on his behalf, the District Court still directed a verdict for petitioners.

With respect to the second factor which determines the outcome of a motion to vacate, whether the defendant has a meritorious defense, there is no question that petitioners satisfied this element since the District Court, after a full trial on the merits, directed a verdict for petitioners. "In determining whether a defaulted defendant has a meritorious defense '[l]ikelihood of success is not the measure' . . . [r]ather if *any* defense relied upon states a defense good at law, then a meritorious defense has been advanced." *United Coin*, 705 F.2d at 845 (quoting *Keegel*, 627 F.2d at 734) (emphasis added). Even before the trial, petitioners asserted that the allegations contained in respondent's complaint, at best, raised issues of negligence which is not cognizable as a constitutional violation. *Daniels* v. *Williams*, 474 U.S. 327 (1986); *Davidson* v. *Cannon*, 474 U.S. 344 (1986). Also, in their motion to set aside the default, petitioners specifically denied the bulk of the allegations contained in respondent's complaint which alleged that pe-

titioners were aware of the dangerous propensities of the person who allegedly struck respondent and of the other individuals in the cell at the time of the incident. In his affidavit in support of the motion to set aside the default, Luckett "specifically denie[d] that the [p]laintiff was placed in a facility with other inmates with a 'known history for assaulting other inmates[.]' " See p. 17a, *infra*. "The key consideration is 'to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.' " *Invest*, 815 F.2d at 399 (quoting, 10 C. Wright, A. Miller, M. Cain, *Federal Practice and Procedure*, §2697 at 531). Thus, it is clear that petitioners indeed had a meritorious defense so as to satisfy the second prong of the *Invest* formula. "[W]hen the first two factors militate in favor of setting aside the entry, it is an abuse of discretion for a District Court to deny a Rule 55(c) motion in the absence of a willful failure of the moving party to appear and plead." *Shepard Claims Serv., Inc.* v. *William Darrah & Associates*, 796 F.2d 190, 194 (6th Cir. 1986).

The third prong of the Fed.R.Civ.P. 55(c) standard asks "[w]hether culpable conduct of the defendant led to the default." *United Coin*, 705 F.2d at 845. In *Shepard Claims*, the Sixth Circuit stated: "[t]o be treated as culpable, the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." *Shepard Claims*, 796 F.2d at 194.

In the case *sub judice*, the record reflects that petitioners did not act willfully or with reckless disregard for the effect of their conduct on these proceedings in their failure to respond to respondent's complaint. On the contrary, the affidavits of Luckett and Roution, attached to their memo-

randum of law in support of the motion to reconsider the order denying petitioners' motion to vacate default judgment, clearly show that petitioners made every reasonable effort to have a response filed to respondent's complaint. See pp. 15a-19a, *infra*. They contacted the Marion County Attorney with respect to the complaint. See pp. 15a-19a, *infra*. Luckett contacted an insurance agent he thought may have written coverage for the claim and personally contacted Kenneth Nevitt, who he knew to be counsel for Kentucky All-Lines Insurance Fund. See pp. 15a-17a, *infra*. The failure on the part of the petitioners to file an affirmative response to this action can be attributed only to the inaction of the Marion County Attorney, Charles T. Mattingly, who was dying of cancer. "Default judgments were not designed as a means of disciplining the bar at the expense of the litigant's day in court." *Jackson*, 636 F.2d at 837. Additionally, on a motion for relief from entry of default, "all doubts are resolved in favor of the party seeking relief." *Jackson*, 636 F.2d at 836.

With respect to this prong, the Sixth Circuit has stated:

> We do not believe it appropriate to attempt a precise definition of 'culpable conduct.' Where the party in default satisfies the first two requirements for relief and moves promptly to set aside the default before judgment is entered, the district court *should* grant the motion if the *party* offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings.

Smith v. *C.I.R.*, 926 F.2d 1470, 1480 (6th Cir. 1991) (quoting *Shepard*, 796 F.2d at 194-195) (emphasis added). Here, as discussed *supra*, petitioners clearly satisfied the first *two* prongs. Also, the record reflects that petitioners moved to set aside the default within five weeks of its entry. Petitioners' affidavits clearly offer a credible explanation for

the delay in filing a responsive pleading. See pp. 15a-19a, *infra*. Thus, it is clear that the Sixth Circuit has applied the Fed.R.Civ.P. 55(c) good cause standard in a way which conflicts with other circuits and with itself, requiring the exercise of this Court's power of supervision.

In light of the foregoing, it is clear that *at least* two of the three Fed.R.Civ.P. 55(c) factors weigh in favor of petitioners. Respondent made *no* substantiated showing of prejudice, and there is no question that petitioners had a meritorious defense. To allow respondent to meet the first prong of the Rule 55(c) test with mere unsworn assertions of counsel effectively reduced the court's analysis to only a two-pronged test, contrary to the Sixth Circuit's own precedent and the precedent of other circuits.

Other factors which supported the District Court's action in setting aside the default include the "strong preference for trials on the merits." *See, e.g., Shepard,* 796 F.2d at 193. Also, Fed.R.Civ.P. 55(c) vests the trial judge with broad discretion regarding whether to set aside a default. *See, Shepard,* 796 F.2d at 193. As Senior Circuit Judge Engel pointed out in his dissent from the Court of Appeals opinion, "such questions seem peculiarly within the knowledge and judgment of a trial judge who is on the scene, who can better weigh the equities and hence exercise the discretion that Rule 55 confers." See p. 10a, *infra*. The fact that respondent had his day in court, and failed to meet his burden of proof, renders the Court of Appeals panel decision remanding the case for hearing on damages a gross miscarriage of justice. Plenary consideration of this matter by this Court is essential.

II. The Sixth Circuit Usurped the District Court's Discretionary Power in Reversing the District Court's Decision to Vacate the Default Entry.

The District Court's decision in setting aside a default is reviewed for abuse of discretion. *United Coin Meter,* 705 F.2d at 843. " 'Abuse of discretion' is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *AmerNational Indus.* v. *Action Tungsram,* 925 F.2d 970, 975 (6th Cir. 1991), *cert. denied,* 111 S.Ct. 2857 (1991) (quoting *Davis* v. *Jellico Community Hosp. Inc.,* 912 F.2d 129, 132-33 (6th Cir. 1990)). "It is well settled that motions to set aside default judgments are left to the sound discretion of the District Court and that appellate courts will not reverse the District Court's decision unless *clearly wrong.*" *Taylor* v. *Boston & Taunton Transp. Co.,* 720 F.2d 731, 732 (1st Cir. 1983) (emphasis added).

Here, it was an abuse of the Court of Appeals supervisory power to substitute its judgment on a matter which is properly regarded as resting within the sound discretion of the District Court. As Senior Circuit Judge Engel noted in his dissent from the panel's decision, "a reasonable trial judge could have decided to set aside the default here." See p. 10a, *infra.* It is clear that the trial judge considered the record before him at the time he set aside the default. The order setting aside the default states, "after considering [petitioners motion for reconsideration of the court's previous order denying petitioners motion to vacate the default] and supporting memorandum and [a]ffidavits as well as [respondents] response to said motion, and the [c]ourt being otherwise sufficiently advised, . . . See p. 12a, *infra.* This is not a situation where the trial judge acted without reason. Petitioners' affidavits, admittedly consid-

ered by the trial judge, clearly set forth reasons why the default should be set aside. Also, on a Fed.R.Civ.P. 55(c) motion, the trial court only had to determine that "good cause" existed to set aside the default. Nonetheless, the Court of Appeals, in the face of a record which absolutely supported the District Court's decision, improperly substituted its judgment for that of the District Court and thereby worked a grave injustice on petitioners.

Moreover, a denial of this petition by this Court will signal to trial courts that decisions which are routinely committed to their discretion, such as Fed.R.Civ.P. 55(c) motions have been until now, may well be reversed on appeal, despite the lack of a clear abuse if discretion or a "clearly wrong" decision by the District Court. *Taylor*, 720 F.2d at 732. This Court should not let such usurpation of power take place without comment or direction.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. If the petitioner is correct in urging that the United States Court of Appeals for the Sixth Circuit erred in reversing the District Court's order vacating the default, the petitioner respectfully requests this Court to vacate the Court of Appeals order that the default be reinstated.

Respectfully submitted
on August 6, 1992,

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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION—Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is reproduced.*

No. 91-5575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORMAS RUSSELL, - - - - - - *Plaintiff-Appellant,*

v.

NEWTON LUCKETT and
JOHN ROUTION, - - - - - - *Defendants-Appellees.*

BEFORE: JONES and MILBURN, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM. Plaintiff Dormas Russell appeals the orders setting aside the entry of default for plaintiff and directing a verdict for defendants Newton Luckett, a jailer, and John Roution, a deputy, in this civil rights action alleging reckless disregard for safety amounting to cruel and unusual punishment. For the reasons that follow, we reverse.

I

At the time of the events relevant to this action, Russell was serving a sentence at Marion County Jail for robbery and attempted escape. The incident leading to the present action began when Todd Beck purchased a candy bar and soft drink for both himself and Russell. Chris Gunn then

approached Beck and attempted to take his candy bar and drink away from him. Russell stepped in between Gunn and Beck, and a verbal confrontation ensued. Russell then returned to his bunk to play cards with Beck, when Gunn suddenly struck him with a broom handle, knocking out the four middle teeth of his upper partial bridge.[1] Russell also suffered a black eye and lacerated lip.

After removing Russell and Beck to another cell, jail personnel took Russell to see a Dr. Polk on two occasions and Dr. Clay Stuart, Russell's longtime dentist, on yet another occasion.[2] Although Russell testified that he did not receive any type of treatment or repair of his teeth for approximately twenty-four months, he acknowledged on cross-examination that for twenty-two of those twenty-four months he was not at the Marion County Jail. He spent the latter period at the Kentucky State Reformatory, where his teeth were not repaired because his condition was characterized as cosmetic.

After Russell's release from the penitentiary, Dr. Stuart temporarily repaired the bridge at a cost of $850.00. Dr. Stuart estimated that complete replacement would cost $2,400.00.

On November 18, 1988, Russell filed a complaint seeking recovery against Luckett and Roution, among others, under 42 U.S.C. § 1983 (1988) for injuries he sustained while in their custody in the Marion County Jail. Each defendant was served with a copy of the complaint on November 29, 1988. In the complaint, Russell alleged that Luckett and Roution housed him in a cell with individuals that they

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[1]Russell had a permanent eight-tooth bridge attached to his natural teeth as a result of an injury received in an automobile accident.

[2]Dr. Stuart had treated Russell since 1979, prior to the automobile accident that first damaged his teeth.

knew were prone to violence. He alleges further that Luckett and Roution were responsible for a broom being left in his cell and, therefore, being used by a fellow inmate to assault him.

Marion County Attorney Charles T. Mattingly was the attorney for Luckett and Roution. Although Mattingly frequently discussed the case with counsel for Russell, James H. Abell, and Abell urged him to file an answer on behalf of Luckett and Roution, Mattingly failed to do so.

Counsel for Russell sought a default judgment against Luckett and Roution on September 18, 1989. On December 13, 1989, the district court made an entry of default against them on the issue of liability and scheduled the matter for hearing on damages for January 31, 1990. On January 17, 1990, however, Kenneth Nevitt, attorney for Marion County's insurer, appeared on behalf of Luckett and Roution and moved the district court to set aside its entry of default of December 13, 1989. Nevitt's motion explained that Mattingly's failure to file an answer or appear for over one year was "due to excusable neglect." J.A. at 28. In particular, Luckett and Roution alleged that,

> in March, 1989, they received notice that a motion to dismiss had been granted to the Defendants. This Order by the Court did not state which parties had been dismissed and Defendants Luckett and Roution assumed that the action had been dismissed against them. They also assumed that the county attorney had filed an answer on their behalf.

Id. Therefore, Nevitt asked the court to "allow these parties an additional twenty (20) days from the date of this Order to file an answer to this complaint." *Id.*

After considering arguments by counsel for both sides, the district court directed Luckett and Roution to submit "an affidavit from the Marion County Attorney relative to his conversations and dealings with counsel for plaintiff."

Id. at 46. After three months passed without a response to its request, the court denied the motion to vacate the entry of default and again scheduled a hearing on August 3, 1990 for the assessment of damages. Prior to that hearing, Nevitt moved the court to substitute Charles Mattingly as counsel of record, which the court ordered on June 29, 1990.

The court rescheduled the hearing for September 28, 1990. On September 21, 1990, however, Joseph H. Mattingly III filed a motion on behalf of Luckett and Roution to continue the hearing on damages, explaining that Charles Mattingly had died on September 4, 1990. Subsequently, on October 15, 1990, Joseph H. Mattingly III filed a motion on behalf of Luckett and Roution, asking the court to reconsider its order denying Luckett's and Roution's motion to vacate entry of default. He included with the motion an answer to the original complaint. Over Russell's objections, the court vacated the entry of default and allowed Luckett and Roution to file the answer on November 9, 1990, just nine days short of two years after Luckett and Roution were served with summons and complaint in this action. The court scheduled the matter for jury trial on February 1, 1991.

Because Russell's injury occurred while he was in custody, the key witnesses in his case were also in custody at the Marion County Jail. By the time this case finally proceeded to trial, several of the witnesses were incarcerated in institutions elsewhere in Kentucky, and others were nowhere to be found. Russell's counsel did, however, locate two witnesses.

Nevitt reappeared as counsel for Luckett and Roution on January 14, 1991. Two weeks later, the matter was tried before a jury. Dr. Stuart testified that, as a result of the assault and loss of his upper four front teeth, Russell suffered immediate pain and injury, and until his bridge

was repaired over two years later, he had trouble biting, and his speech was affected by a lisp. His appearance was also an embarrassment to him.

At the conclusion of Russell's case, the judge directed a verdict in favor of Luckett and Roution and dismissed the case with prejudice. Russell now brings this appeal.

II

Russell contends that the district court abused its discretion in setting aside the default judgment almost a year after its entry and two years after Luckett and Roution were served with a summons and complaint. The district court may set aside an entry of default "for good cause shown." Fed. R. Civ. P. 55(c). The district court's decision is reviewed for abuse of discretion. *United Coin Meter Co.* v. *Seaboard Coastline R.R.*, 705 F.2d 839, 843 (6th Cir. 1983). In making this determination, the court of appeals employs a three-part test: "'[1] [w]hether the plaintiff will be prejudiced; [2] [w]hether the defendant has a meritorious defense; and [3] [w]hether culpable conduct of the defendant led to the default.'" *INVST Finan. Group, Inc.* v. *Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 398 (6th Cir.) (quoting *United Coin*, 705 F.2d at 845), *cert. denied*, 484 U.S. 927 (1987). "The same considerations exist when deciding whether to set aside either an entry of default [Rule 55(c)] or a default judgment [Rule 60(b)], but they are to be applied more liberally when reviewing an entry of default." *Berthelsen* v. *Kane*, 907 F.2d 617, 620 (6th Cir. 1990) (per curiam). "'Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits.'" *United Coin*, 705 F.2d at 846 (quoting *Tozer* v. *Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951)).

The first prong of the test asks whether the plaintiff would be prejudiced by the order setting aside default. Mere delay does not establish prejudice. *INVST*, 815 F.2d

at 398. The plaintiff must show a negative effect from the delay, such as loss of evidence or difficulties in discovery. *Id.*

In his motion for reconsideration of the court's order setting aside default, Russell alleged such negative effects:

> [D]uring the past two years the plaintiff's witnesses who were present at the time of the injury have moved to other jurisdictions unknown to the plaintiff. At this late date, it will be difficult, if not impossible, to locate those witnesses and bring them to trial to testify on behalf of the plaintiff.
>
> Even if the plaintiff is able to locate the missing witnesses, the events which are the subject of this action occurred years ago. At this point, the evidence from both a documentary and testimonial standpoint is stale.

J.A. at 119. Russell's injury occurred while he was in custody at Marion County Jail, so the key witnesses were also in custody at that time. Two years later, however, the witnesses were all either in other prisons or nowhere to be found. Under the circumstances of this case, it seems that Russell made an adequate showing of prejudice.

The second prong of the test asks whether the defendant has a meritorious defense. This is not meant to be a technical inquiry. "The key consideration is 'to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.'" *INVST*, 815 F.2d at 399 (quoting 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2697, at 531 (1983)). In this regard, Luckett and Roution asserted the following in their successful motion to set aside default:

> Basically, the Plaintiff alleges that the Defendants' conduct constituted a reckless disregard for his health

and safety. However, the allegations contained in the Plaintiff's complaint, at best, raise issues of negligence which is not cognizable as a constitutional violation. *Swarts* v. *Johnson*, 628 F. Supp. 549 (W.D. Mich. 1986). The indifference alleged of the Defendants must be *substantial* to violate the constitution. *Estelle* v. *Gamble*, 429 U.S. 97 . . . (1976).

The Defendants specifically deny the bulk of the allegations contained in the Plaintiff's complaint concerning the "known history of assaulting other inmates" of the other prisoners with whom the Plaintiff was placed. The Defendants would further seek to show that promptly following the incident they took the Plaintiff to a local dentist who examined the Plaintiff's condition and determined that there was no medical urgency to perform the dental work requested by the Plaintiff.

The Plaintiff was in the custody of the Marion County Jailer and his Deputy for slightly over one month. Following that period of incarceration, he was transferred to the custody of the Warden of the Kentucky State Reformatory. Claims were made against the Warden of that reformatory and against the Secretary of the Corrections Cabinet of the Commonwealth of Kentucky on similar grounds. Those causes of action were dismissed by this Court and it is the Defendants' belief that if they are provided an opportunity to defend this action the Court will find that the claims against them are equally without merit.

J.A. at 65-66. The fact that Luckett and Roution were not aware of the dangerous propensities of Gunn and the other individuals in the cell at the time of the incident is certainly a defense if proven.[3] Thus, Luckett and Roution satisfied the second prong of the test.

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[3]Note that Luckett's and Roution's other "defenses" address the provisions of inadequate medical care, which Russell does not allege.

The third prong of the test asks whether culpable conduct of the defendant led to the default. "To be treated as culpable, the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." *Shepard Claims Serv., Inc.* v. *William Darrah & Assoc.*, 796 F.2d 190, 194 (6th Cir. 1986).

Shepard involved a case in which a lawyer was one week late in filing an answer due to his failure to review the work of his secretary. In finding no culpable conduct, the *Shepard* court relied on the fact that "[t]he delay was not lengthy and there was no patten of disregard for the court orders or rules." *Id.* The court concluded as follows:

> Although a party who chooses an attorney takes the risk of suffering from the attorney's incompetence, we do not believe that this record exhibits circumstances in which a client should suffer the ultimate sanction of losing his case without any consideration of the merits because of his attorney's neglect and inattention.

Id. at 195.

In the case sub judice, however, the record clearly reveals a reckless pattern of disregard for the court's orders and rules. We may assume, *arguendo,* that the delay through January 17, 1990—resulting from Charles Mattingly's illness and Luckett's and Roution's confusion as to the status of the action—would not bar Luckett's and Roution's motion to set aside the default. Nonetheless, the failure of attorney Nevitt to respond to the court's request for additional information prevented resolution of this matter at an earlier date. Nevitt was much more than a last-minute substitute attorney; he played a central role in this litigation, as evidenced by his later return to try this case before a jury. Furthermore, Nevitt's return of the case to Charles Mattingly belies any contention that Luckett

and Roution should not be accountable; certainly, once an attorney has failed to perform his or her duties on a client's behalf to the extent that substitute counsel is necessary, a client must assume the risk of returning the case to that same attorney.

The *INVST* court found no culpable conduct underlying a sixteen-month delay in filing an answer. 815 F.2d at 399-400. In that case, however, "both parties acted as if the answer had been filed or was not needed." *Id.* at 399. Here, Russell's counsel continuously demanded that Luckett's and Roution's counsel file an answer. Thus, review of the record reveals that default resulted from reckless disregard.

Balancing the factors is simpler than it might first appear. Only one of the three factors weighs in favor of Luckett and Roution. To hold that Luckett and Roution are entitled to set aside the default would be to hold that a meritorious defense will always excuse a defendant's reckless disregard for the court and its rules and permit prejudice to the plaintiff. Such a holding would also reduce this court's inquiry to a one-prong test. Accordingly, review of the record in this case reveals that the district court abused its discretion in setting aside the default.[4]

III

For the foregoing reasons, the decision of the district court to set aside entry of default is REVERSED, the judgment of the district court is REVERSED, and the case is REMANDED for entry of default, a hearing on damages, and judgment by default.

ISSUED AS MANDATE: 5/28/92

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[4]Because of our disposition of this issue, we do not reach the issue of whether the district court erred in directing a verdict for Luckett and Roution.

ENGEL, SENIOR CIRCUIT JUDGE, DISSENTING. I respectfully dissent because I believe that the range of discretion accorded the trial judge in setting aside defaults under F.R.Civ.P. 55(c) (as contrasted to default judgments) is particularly broad.

Several factors support Judge Ballantine's action in setting aside the default. First, we have previously announced "a strong preference for trials on the merits." *See, e.g., Shepard Claims Service* v. *William Darrah & Assoc.*, 796 F.2d 190, 193 (6th Cir. 1986). In addition, it seems that this case presented genuine confusion regarding who was to represent the defendants. Such uncertainty is not unlikely where, as here, it is unclear whether the defendants are sued in a personal or official capacity. Further, one of the defense attorneys was terminally ill and ultimately died. Perhaps the illness should not excuse delay caused by other defense attorneys, but such questions seem peculiarly within the knowledge and judgment of a trial judge who is on the scene, who can better weigh the equities and hence exercise the discretion that Rule 55 confers. Finally, the "negative effects" of delay that Russell alleged here are factually quite general and probably lacked the specificity which might otherwise have persuaded Judge Ballantine that Russell would be prejudiced by setting aside the default.

Had I been in Judge Ballantine's shoes, I might myself have denied the motion to set aside the default, because I am in general sympathy with many of the reasons set forth by the majority. There are good reasons to enforce the time requirements. Nevertheless Rule 55(c) vests a trial judge with broad discretion whether to set aside a default. A reasonable trial judge could have decided to set aside the default here. I would therefore affirm.

No. 91-5575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORMAS RUSSELL, - - - - - *Plaintiff-Appellant,*

v.

NEWTON LUCKETT;
JOHN ROUTION, - - - - - *Defendants-Appellees,*

AL C. PARKE;
GEORGE W. WILSON, - - - - - - - *Defendants.*

ORDER—Filed May 8, 1992

BEFORE: JONES and MILBURN, Circuit Judges; and ENGEL, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

CA-88-0806-L-B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DORMAS RUSSELL - - - - - - - - - *Plaintiff*

vs.

NEWTON LUCKETT, et al. - - - - - - *Defendants*

ORDER—Entered November 9, 1990

This matter having come before the Court on motion of the Defendants for reconsideration of this Court's previous Order denying the Defendants motion to vacate the Default Judgment entered herein on December 13, 1989. The Defendants further move for leave to file an Answer to the Plaintiff's Complaint. After considering said motion and supporting memorandum and Affidavits as well as the Plaintiff's response to said motion, and the Court being otherwise sufficiently advised, IT IS HEREBY ORDERED as follows:

1. That the Default Judgment entered against the Defendants on December 13, 1989 be, and it hereby is, vacated, the Defendants having shown good cause therefore;

2. That the Defendants be and they hereby are granted leave to file the Answer tendered with their motion, said Answer being considered filed with the entry of this Order.

DATED this 8th day of November, 1990.

/s/ Thomas A Ballantine, Jr.
Thomas A Ballantine, Jr.,
Chief United States District Judge
Western District of Kentucky

Copies to:
Joseph H. Mattingly III, Esq.
Pam Carroll, Esq.
James H. Abell, Esq.

C 88-0806-L-(B)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DORMAS RUSSELL - - - - - - - - - *Plaintiff*

v.

NEWTON LUCKETT, et al. - - - - - - *Defendants*

ORDER—Entered January 2, 1991

This matter is before the Court on motion of the plaintiff to reconsider the order vacating the default judgment against defendants Luckett and Roution.

The Court remains convinced that the interests of justice dictate that the action be tried on its merits, and the motion to reconsider is denied.

IT IS SO ORDERED this 2nd day of January, 1991.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
Chief Judge, U. S. District Court

Copies to counsel

CA-88-0806-L-B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DORMAS RUSSELL - - - - - - - - - - *Plaintiff*

vs.

NEWTON LUCKETT, et al. - - - - - - *Defendants*

AFFIDAVIT OF NEWTON LUCKETT

Comes the Affiant, Newton Luckett, and after first being duly sworn, states as follows:

1. That he is a Defendant in the above-referenced action and is the duly elected jailer of Marion County, Kentucky;

2. That this Defendant was served with a copy of the Summons and Complaint in this action on November 29, 1988, and immediately thereafter delivered that Summons and Complaint to Charles T. Mattingly, then Marion County Attorney;

3. That on numerous occasions following his receipt of the Summons and Complaint on November 29, 1988, the Affiant contacted Charles T. Mattingly and requested information as to the progress of this case and whether a response had been filed to the Complaint;

4. That the Affiant became concerned as to whether a response had been filed to the Plaintiff's Complaint and

contacted Charles Lancaster, local insurance agent for Titan Indemnity Company, concerning defense to this case;

5. That each time the Affiant contacted Charles T. Mattingly concerning the progress in this case he was assured by said Charles T. Mattingly that the case was being taken care of;

6. That after learning that a default had been entered against him, the Affiant personally contacted W. Kenneth Nevitt of the law firm of Williams and Wagner, who the Affiant new to be counsel for Kentucky All-Lines Insurance Fund who had written the County's insurance coverage at that time;

7. That the Affiant also contacted Cheryl Roberts, Facilities Director for the Kentucky Corrections Cabinet concerning defense of this case and consulted with the President of the Kentucky Jailers Association with respect to the problems he was encountering in obtaining a defense to this case;

8. That the Affiant specifically denies that he or his staff violated the Plaintiff's constitutional rights;

9. That on the date the subject incident allegedly occurred, neither the Affiant nor his staff received an immediate complaint from the Plaintiff of the alleged assault and it was only later that day that they were advised that the incident had allegedly occurred. At the time of the report of the alleged incident, the Plaintiff did not seem to be in any immediate distress;

10. That after being advised of the alleged assault, the Affiant's staff promptly transported the Plaintiff to the office of John Polk, DMD, who examined the Plaintiff and advised the Afffiant that the Plaintiff was in no immediate danger and recommend that, based upon the short time period that the Plaintiff would be in the custody of the Marion County Jailer, that treatment of the damage to his

bridgework be delayed until he was transported to a state facility;

11. That the Affiant specifically denies that the Plaintiff was placed in a facility with other inmates with a "known history for assaulting other inmates;"

Further Affiant sayeth naught.

/s/ Newton Luckett
Newton Luckett

STATE OF KENTUCKY
COUNTY OF MARION

Subscribed and sworn to before me by Newton Luckett, this 15 day of October, 1990.

My Commission expires: 01-08-94

/s/ Joseph H. Mattingly III
Notary Public, State of KY at Large

I hereby certify a copy of the foregoing was mailed this 15 day of October, 1990, to:

Pam Carroll, Esq.
25 Fountain Place
Frankfort, Kentucky 40601
James H. Abell, Esq.
One Court Square
Lebanon, Kentucky 40033

By /s/ Joseph H. Mattingly III
Joseph H. Mattingly III

CA-88-0806-L-B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DORMAS RUSSELL - - - - - - - - - *Plaintiff*

vs.

NEWTON LUCKETT, et al. - - - - - - *Defendants*

AFFIDAVIT OF JOHN ROUTION

Comes the Affiant, John Roution, and after first being duly sworn, states as follows:

1. That he is a Defendant in the above-referenced action and is formerly a deputy jailer of Marion County, Kentucky;

2. That after receiving his copy of the Summons and Complaint in this action, he turned his copy of said Summons and Complaint over to Charles T. Mattingly, former Marion County Attorney, who assured the Affiant that he would arrange for a defense to the charges in the Complaint.

Further Affiant sayeth naught.

/s/ John Roution
John Roution

STATE OF KENTUCKY
COUNTY OF MARION

Subscribed and sworn to before me by John Roution, this 15 day of October, 1990.

My Commission expires: 06-10-94

/s/ Illegible
Notary Public, State of KY at Large

I hereby certify a copy of the foregoing was mailed this 15 day of October, 1990, to:

Pam Carroll, Esq.
25 Fountain Place
Frankfort, Kentucky 40601

James H. Abell, Esq.
One Court Square
Lebanon, Kentucky 40033

By /s/ Joseph H. Mattingly III
Joseph H. Mattingly III

CA-88-0806-L-B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DORMAS RUSSELL - - - - - - - - - *Plaintiff*

vs.

NEWTON LUCKETT, et al. - - - - - - *Defendants*

AFFIDAVIT OF SALEM M. GEORGE, MD

Comes the Affiant, Salem M. George, MD, and after first being duly sworn, states as follows:

1. That he is a medical doctor duly licensed to practice family medicine in the Commonwealth of Kentucky;

2. That he was the regular physician for Charles T. Mattingly during Mattingly's lifetime;

3. That in July, 1990, he examined Charles T. Mattingly and found evidence of progressed lung cancer;

4. That in August, 1990, Charles T. Mattingly underwent major surgery which included removal of one lung;

5. That following Mattingly's surgery, he was unable to engage in any physical activity and ultimately died on September 7, 1990;

6. That based on his examination of Charles T. Mattingly, and the subsequent examinations by other physicians, it is the Affiant's strong opinion that Charles T.

Mattingly had been suffering a severe and progressed case of lung cancer for several months prior to this Affiant's discovery of that condition in July, 1990.

Further Affiant sayeth naught.

/s/ Salem M. George, MD
Salem M. George, MD

STATE OF KENTUCKY
COUNTY OF MARION

Subscribed and sworn to before me by Salem M. George, MD, this 15 day of October, 1990.

My Commission expires: 2-9-94

/s/ Vicky W. Perkins
Notary Public, State of KY at Large

I hereby certify a copy of the foregoing was mailed this 15 day of October, 1990, to:

Pam Carroll, Esq.
25 Fountain Place
Frankfort, Kentucky 40601

James H. Abell, Esq.
One Court Square
Lebanon, Kentucky 40033

By /s/ Joseph H. Mattingly III
Joseph H. Mattingly III

CA-88-0806-L-B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DORMAS RUSSELL - - - - - - - - - *Plaintiff*

vs.

NEWTON LUCKETT, et al. - - - - - - *Defendants*

AFFIDAVIT OF JOSEPH H. MATTINGLY III

Comes the Affiant, Joseph H. Mattingly III, and after first being duly sworn, states as follows:

1. That he is the Marion County Attorney, having been appointed as such by the Marion County Judge/Executive on September 18, 1990, to succeed the former Marion County Attorney, Charles T. Mattingly, who died September 7, 1990;

2. That the Affiant is acting as counsel for the Defendants herein pursuant to KRS 69.210 and the direction of the Marion County Fiscal Court;

3. That representation of the Defendants is being provided after having advised the Defendants that the Marion County Fiscal Court does not assume responsibility for any judgment rendered in this matter and after having encourage the Defendants to obtain private counsel of their choice;

4. That the Affiant is in custody of the records of this action obtained from the office of Charles T. Mattingly and that those records reflect that, after receiving a copy of the Summons and Complaint herein, the said Charles T. Mattingly contacted the Titan Indemnity Company, Kentucky All-Lines Insurance Fund and the Commonwealth of Kentucky, Department of Insurance seeking representation of the Defendants pursuant to Marion County's contract with those companies to provide defense of claims such as this;

5. That, based upon the responses of the Titan Indemnity Company, and Kentucky All-Lines Insurance Fund and the Department of Insurance, and upon the extensive review of each of the policies written for the County from January, 1987, when the subject incident allegedly occurred, and November 19, 1988, when this claim was made, the Affiant is convinced that the Defendants are not covered by any insurance policy for the incident alleged in the Plaintiff's Complaint;

6. That by reconsidering its previous Order overruling the Defendants' motion to set aside the default entered herein, the Plaintiff will not be unduly prejudiced since the bridgework which was allegedly broken as a result of this incident has been repaired and the Plaintiff is under no physical pain at this time.

Further Affiant sayeth naught.

/s/ Joseph H. Mattingly III
Joseph H. Mattingly III

STATE OF KENTUCKY
COUNTY OF MARION

Subscribed and sworn to before me by Joseph H. Mattingly III, this 15 day of October, 1990.

My Commission expires: 06-10-94

/s/ Lisa L. Cox
Notary Public, State of KY at Large

I hereby certify a copy of the foregoing was mailed this 15 day of October, 1990, to:

Pam Carroll, Esq.
25 Fountain Place
Frankfort, Kentucky 40601

James H. Abell, Esq.
One Court Square
Lebanon, Kentucky 40033

By /s/ Joseph H. Mattingly III
Joseph H. Mattingly III